Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

GILBERT M. GRAHAM

Petitioner,

v.

JOHN D. ASHCROFT, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia has held that the Civil Service Reform Act of 1978 ("CSRA") precludes judicial review of petitioner's claim that the Federal Bureau of Investigation ("FBI") violated its own regulations in taking personnel action against petitioner. The district court therefore had no subject matter jurisdiction over petitioner's *Vitarelli* claim. The panel that initially heard the appeal held that the district court properly dismissed petitioner's equal protection claim in light of *Brown v. General Services Administration*, 425 U.S. 820 (1976). This holding raises three substantial questions that warrant review by this Court:

1. Whether petitioner may obtain judicial review of colorable constitutional claims under the general federal question, 28 U.S.C. 1331.

2. Whether, under the principles enunciated in *Vitarelli v. Seaton*, that the CSRA precludes judicial review where the FBI violated its own regulations.

3. Whether Title VII of the Civil Rights Act of 1964 precludes judicial review of an alleged violation of the Equal Protection Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioner, Gilbert M. Graham was the plaintiff in the district court and the appellant in the court of appeals. He brings this action on his own behalf.

Respondent, United States Attorney General, John D. Ashcroft was the defendant in the district court and appellee in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. Because this Court has sustained the "right of every citizen to require that the government be administered according to law," the appeals court's decision involves issues of national importance.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 358 F. 3d 931. The court of appeals' order denying petition for rehearing (Pet. App. 24a) is not reported. The opinion of the district court (Pet. App. 13a) is reported at 2002 WL 32511002.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2004. A petition for rehearing was filed on April 7, 2004, and denied on April 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the Constitution provides that "[n]o person shall be . . .deprived of life , liberty, or property, without due process of law . . . ."

2. The Equal Protection Clause of the Fifth Amendment of the Constitution provides, in pertinent part, that

no government actor shall "deny to any person within its jurisdiction the equal protection of the law."

3. Pursuant to 28 U.S.C. 1331, federal courts shall have original jurisdiction over "all civil actions under the Constitution, laws, or treaties of the United States."

4. The National Foreign Intelligence Program Manual ("NFIPM"), Part I, Section 6-7.4.2., provides, in pertinent part, that all potential Intelligence Oversight Board ("IOB") matters detected by FBI field divisions are to be reported to the FBI, Inspection Management Unit within 14 days of discovery of the possible violation. The report should be captioned with the names of the involved employees, to include supervisors[1].

5. The Manual of Administrative and Operational Procedures ("MAOP"), Part I, Section 13.5 (e) provides, in pertinent part, that if the FBI Inspection Division or Division Review Board finds that an employee has not received the procedural protections in the disciplinary process to which he is entitled, it may retain the matter for decision, e.g., when the matter involves harmless error, may refer the matter back to the Office of Professional Responsibility ("OPR") for corrective action; or may reverse or modify the action of the deciding official.

6. The MAOP, Part I, Section 14-1 provides, in pertinent part, that the FBI has always attempted to anticipate and avoid possible sources of employee discontent or grievance

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[1] Since the National Foreign Intelligence Program Manual is a classified document, relevant portions included in the Appendix filed with this petition were disseminated in an unclassified electronic communication dated July 10, 2000.

by following fair and objective policies, uniformly applied to all. To detect and solve grievances which might arise, the FBI depends upon the alertness of its supervisors and officials.

STATEMENT OF THE CASE

This case is about the vindictive and ultra vires reporting of a potential IOB violation involving an electronic surveillance ("ELSUR") operation targeting a hostile intelligence service. On April 14, 1999, the FBI, Washington Field Division reported that petitioner had improperly requested ELSUR coverage on three telephone lines that had not been authorized by the Foreign Intelligence Surveillance Court. Upon discovery of this harmless error, an FBI Telecommunications Technician immediately discontinued the preliminary phase of the ELSUR operation. A subsequent computer analysis determined that no information had been monitored or accessed by FBI employees. Notwithstanding the inadvertent administrative oversight that resulted in a harmless error, in conjunction with the fact that the three telephone lines were subscribed to by foreign diplomatic officials who were suspected of conducting intelligence operations against the United States, petitioner was alleged to have engaged in investigative dereliction, resulting in a violation of IOB requirements.

The FBI ignored the fact that no information had been accessed or monitored by any employees. Prior to reviewing petitioner's signed, sworn statement consisting of substantial mitigating facts, a gratuitous OPR investigation was initiated, resulting in an unlawful administrative sanction. Even assuming that petitioner's actions were intentional or conscious neglect, the FBI violated its own rules in reporting and investigating an alleged IOB matter, and in so doing, violated petitioner's constitutional rights.

I. Factual Background

A. Petitioner

Petitioner, Gilbert M. Graham is an African American, who began his career as a Special Agent on August 13, 1978. Regarding the alleged IOB violation, the FBI admitted that none of the employees under investigation intentionally through investigative action or inaction violated IOB requirements. (Reply Brief, Ap. 6[2]). The FBI also admitted that the administrative inquiries were initiated and processed outside the protections established by OPR and outside the IOB process. (Ap. 7) (citing to comments of FBI, Acting Assistant Director, James T. Caruso, concerning IOB matters). After twenty-five years of dedicated service, petitioner retired on September 3, 2003.

B. FBI Policy Concerning IOB Violations

Pursuant to the NFIPM, Part I, Section 6-7.4.2., IOB reports must contain a complete synopsis of the possible violation, including: (1) clearly defining the questioned activity; (2) the date of the activity; (3) the date of discovery; (4) the involved employees explanations; and (5) recommendations for administrative action from the division head.

C. The FBI's Violation Of Its Policies.

In reporting the alleged IOB violation involving

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[2] Citations herein, other than to the Appendix filed with this petition are to record documents contained in the Appellant's Reply Brief cited as "Ap." followed by the page number.

petitioner, the FBI violated its policies in the following manner: (1) all Caucasian employees involved in this matter were not reported; (2) an African American employee who was not involved was reported; (3) petitioner was prohibited from submitting an explanatory statement with the report; (4) division head comments were not submitted with the report; (5) Caucasian employees who were not involved provided an explanatory statement; (6) OPR violated the established procedural protections, and (7) the FBI was neither fair nor objective in the administrative proceeding.

II. Proceedings Below

This action originated based on the FBI's stubborn refusal to accept the fact that petitioner's inadvertent administrative oversight did not rise to the level of investigative dereliction, resulting in a violation of IOB requirements. The FBI determined that based on a preponderance of the evidence and relevant disciplinary policy and precedent, petitioner's actions did not warrant a three day suspension from duty, without pay. Nevertheless, while performing his investigative and administrative duties under extraordinary circumstances, petitioner was unlawfully sanctioned with the issuance of a letter of censure. Following the administrative appeal process, on June 21, 2002, a civil complaint was filed invoking the district court's federal question jurisdiction. Based on the premise that the FBI had violated its own rules, the complaint alleged a violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Fifth Amendment of the Constitution.

A. The District Court

On November 20, 2002, the district court dismissed this case, thwarting one of the hallmarks of the American

administrative law system – the presumption of judicial review of agency action. The court's dismissal contravenes this Court's statement that "the APA's generous review provision must be given a hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Irrespective of the presumption of judicial review and the proper interpretation of the abuse of discretion standard, the district court concluded that the CSRA's comprehensive scheme barred the court from reaching the merits of petitioner's APA claim. (Pet. App. 18a). The court reached this conclusion in the absence of reviewing the administrative record documenting the challenged action. Therefore the court's opinion was not based on any evidentiary factors from which to make the appropriate factual and legal determination as to: (1) whether the FBI acted within the scope of its authority; (2) whether the FBI complied with prescribed procedures; and (3) whether the action is otherwise, arbitrary, capricious or an abuse of discretion. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1574 (10th Circuit 1994).

Conversely, the district court held that petitioner's constitutional challenges to the FBI's actions stand on a different footing. The court noted that the law in this circuit generally allows employees to seek equitable relief against their employers for alleged constitutional violations, even where similar statutory claims would be barred. *Spagnola v. Mathis*, 859 F. 2d 223, 229-30 & n. 12 (D.C. Cir. 1988). (Pet. App. 18a). In spite of the precedential value of *Spagnola* where this circuit held that the CSRA is not the exclusive remedy for federal employees for all employment wrongs, the district court determined that petitioner could not obtain judicial review of his due process claim.

Although petitioner could have demonstrated the deprivation of a protected interest, the court dismissed this case

prior to giving any consideration to an important statement from this Court, that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Based on these principles, this Court developed a three factor balancing test to determine what type of process is due before the government can deprive a person or entity of a protected interest. Contrary to the principles established by this Court to determine what process is due, the district court restricted petitioner's protected liberty interest to harm done to his reputation. The court determined that since there was neither loss of pay or benefits, no constitutionally protected liberty interest was implicated by the FBI's actions. (Pet. App. 20a). Even if petitioner did not have due process rights apart from those which the agency created by its own regulations, "designed to benefit aggrieved employees during administrative proceedings," the court concluded that his constitutional claim could not prevail, "because it is clear that he received all of the process due him under the Fifth Amendment." (Pet. App. 21a).

Concerning the equal protection claim, the district court held that this claim was not precluded by the CSRA, but is foreclosed by another federal statute: Title VII. The court annulled this constitutional safeguard by gratuitously asserting that "plaintiff is unquestionably seeking to redress the violation of rights guaranteed by the statute, and as such, Title VII provides the exclusive basis for that claim." (Pet. App. 23a).

B. The Court of Appeals

On August 5, 2003, the Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the constitutional claims and held that petitioner had no general right of review under the APA. Because summary disposition was not in order with respect to the *Vitarelli* claim, this case

was presented to a merits panel, with oral argument scheduled for January 13, 2004.

On February 24, 2004, the panel held that the CSRA precludes judicial review of claims that the FBI violated its own regulations in taking personnel action against petitioner. In concert with respondents' argument that the basic premise of this case involved a minor personnel action, the appeals court reasoned that "it is no answer to invoke the principle that agencies must follow their own regulations. That was, after all, the assertion in *United States v. Fausto*, 484 U.S. 439 (1988), [where] the Court held that it was trumped by the proposition that agencies cannot purport to confer rights undermining a comprehensive congressional scheme." (Pet. App. 10a).

The appeals court also relied on *Carducci,* where it previously interpreted that the CSRA precludes judicial review for specified minor personnel actions not infected by "particular heinous motivations or disregard of law." The court included in this category non-constitutional claims that were "relatively minor both in their substantive effect and in the malevolence of their motivation." *Carducci v. Reagan*, 714 F. 2d 171, 175 (D.C. Cir. 1983). Unlike *Carducci*, this case involves unconstitutional personnel actions invidiously motivated for reasons wholly beyond any legitimate government objective. The court stated that *Fausto* is not "directly on point," but was not persuaded by petitioner's argument that cases like *Fausto* and *Carducci* are completely unavailing here, where it is alleged that the FBI violated his constitutional rights. Even if the CSRA precludes judicial review concerning minor personnel actions, this Court determined that review is available where agency actions violate the procedural protections guaranteed in its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959).

On April 30, 2004, the court of appeals denied petitioner's request for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This case presents important issues of fundamental national importance, which were resolved erroneously by the court of appeals. The court's decision contravenes the requirements of federal law and is inconsistent with its previous decisions. The court's decision also conflicts with this Court's precedent concerning the right of federal employees to obtain judicial review of constitutional claims. It is a compelling reason to grant this petition, as the court of appeals has entered a decision that is in conflict with other United States courts of appeals on an important matter. Sup. Ct. R. 10(a).

If review is declined, the observance of procedural safeguards shall be rendered ineffectual, and "otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 108, 110 (1902).

I. Review Is Warranted Because The Court Of Appeals Disregarded Federal Law Governing Original Jurisdiction Over Petitioner's Constitutional Claim.

The appeals court previously stated that "if there is any foundation of plausibility to a claim, federal jurisdiction exists." *Payne v. Government of D.C.*, 559 F. 2d 809, 823 (D.C. Cir. 1977). In this instance, the court's inconsistent decision determined that petitioner's *Vitarelli* claim was precluded by the CSRA, therefore was not judicially cognizable.

In *Griffith v. FLRA*, 842 F. 2d 487 (D.C. Cir. 1988), the appeals court held that the CSRA remedial scheme did not preclude the plaintiff from pursuing judicial review of a constitutional challenge. Looking to the language and legislative history of the CSRA in light of the principle that congressional preclusion of judicial review must be clear and convincing, the court concluded from the absence of an express preclusion in the statute, or any other basis upon which to infer preclusion, that review of plaintiff's constitutional claim was permissible. Prior to *Griffith*, the appeals court held that "Congress intended the CSRA to provide additional, not decreased, protection for employees who blow the whistle on illegal or improper government conduct." *Borrell v. U.S. International Communications Agency*, 682 F. 2d 981, 990 (D.C. Cir. 1982)(CSRA does not supplant judicially-created remedies for constitutional violations)(citing legislative history).

In *Spagnola* (supra), the appeals court commented: "[W]e do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether . . . . On the contrary, time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of constitutional rights." *Hubbard v. EPA*, 809 F. 2d 1, 11 (D.C. Cir. 1986); *Williams v. IRS*, 745 F. 2d 702, 705 (D.C. Cir. 1984).

This Court has determined that it cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. The Court held that the courts had jurisdiction to enjoin an administrative officer from acting unlawfully, noting that "acts of all [a government department's] officers must be justified by some law, and in case an official violates the law to

the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing*, 187 U.S. 94, 108, 110.

In *Bell v. Hood*, 327 U.S. 678, 681 (1946), this Court instructed that before dismissing a case for lack of jurisdiction, the district court must look to the complaint to ascertain how plaintiff, as "master to decide what law he will rely upon," defines the claim. *Id.* at 681. The Court ruled that where, as here, a complaint is "so drawn as to seek recovery directly under the Constitution or laws of the United States" the court must assume jurisdiction under 28 U.S.C. 1331. *Id.* Dismissal is appropriate only if the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-683.

Petitioner's complaint alleged that the FBI's reporting and investigation of a potential IOB matter was conducted in violation of its regulations. The complaint further alleged that the FBI violated petitioner's Fifth Amendment rights, and was arbitrary and capricious within the meaning of the APA. Since there can be little doubt that the FBI's failure to abide by its own regulations can be a violation of procedural due process, petitioner's constitutional claim is, indeed, colorable. Unless the appeals court had determined that this claim was made solely to obtain jurisdiction, and was "wholly insubstantial and frivolous" as to warrant dismissal for want of jurisdiction, the court's decision is otherwise erroneous.

Given the importance of this issue, this Court should clarify congressional intent when it directed that all federal controversies are cognizable within the jurisdiction of district courts under 28 U.S.C. 1331. If such is the case, then the judgment below must be reversed.

II. Review Is Warranted Because The Court Of Appeals Decision Conflicts With This Court's Precedent Concerning Judicial Review Of Constitutional Claims.

This Court has consistently demanded government compliance with regulations designed to safeguard individual interests even when the rules were not mandated by the Constitution or federal statute. In a long line of cases beginning with *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945), this Court has held that "one under investigation . . . is legally entitled to insist upon the observance of rules promulgated by an executive or legislative body for his protection." *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Yellin v. United States*, 374 U.S. 109 (1963); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

More definitive still is this Court's decision in *Webster v. Doe*, 486 U.S. 592, 602-05 (1988), where it addressed whether employment decisions by the Director of the Central Intelligence Agency ("CIA") were subject to judicial review. In *Webster*, plaintiff Doe was discharged after informing the agency that he was a homosexual. He contested his termination partly on constitutional grounds. The court held that the termination of employees was committed to agency discretion by law and that judicial review of those decisions was precluded under § 701(a)(2) of the APA. However, this Court clarified that such a holding did not preclude review of constitutional claims, noting that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603.

Contrary to *Webster*, the appeals court adopted the proposition that the CSRA precludes judicial review of petitioner's *Vitarelli* claim. Because the court's decision "conflicts with [a] relevant decision [] of this Court," review is warranted. As Justice Scalia stated in *Reed v. Collyer*, 487 U.S. 1225 (1988), "[i]f we adhere to the rationale of *Webster*, we should certainly grant this petition for certiorari, vacate the judgment of the [D.C. Circuit], and remand this case for reconsideration in light of *Webster*." (SCALIA, J., dissenting).

III. Review Is Warranted Because The Circuit Courts Are Divided On Whether Statutory Schemes Such As Title VII Forecloses Constitutional Claims.

It is well settled precedent that a cause of action may be implied directly under the Equal Protection Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right. *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410, 411 (1913), this Court stated: ". . . the party who brings a suit is master to decide what law he will rely upon, and . . . does determine whether he will bring a suit arising under the . . . (Constitution or laws) of the United States by his declaration or bill." Accordingly, this case was brought in the context of the FBI's violation of petitioner's right to equal protection of the law. The complaint alleged, *inter alia*, that the FBI failed to report all Caucasian employees involved in the IOB matter. The FBI's violation of a facially neutral policy was motivated by discriminatory animus and its application resulted in a discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977). Although the FBI was not required to provide any explanation for its actions, it has long

been recognized that when the government treats two classes of citizens differently under the law, the government must demonstrate that such treatment is at least rationally related to a legitimate government purpose. *City of Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432, 440 (1985); *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

Under the proposition of the Fifth Amendment, any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny. This Court stated that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273-74 (1986).

The courts below disregarded the requirement to conduct judicial review and dismissed the equal protection claim by asserting that such claims are an attempt to evade "the rigorous administrative exhaustion requirements and time limitations of Section 717 of Title VII." In applying the rationale of *Brown* (supra), the district court held that "[a]llowing federal employees to recast their Title VII claims as constitutional claims would clearly threaten those same policies." *Id.* at 820. The court's assertion implies that the equal protection claim was not properly framed and that petitioner engaged in artful pleading to recast a claim of federal employment discrimination as a constitutional challenge. Contrary to the court's presumptive opinion, it was not petitioner's intent to file a timely complaint under 717(c). As this Court held in *Brown*, unless petitioner had failed to file a timely complaint under 717(c), the district court's dismissal of his equal protection claim is improper.

The appeals court's decision to affirm dismissal of this claim conflicts with other circuits where there is general agreement that door-closing statutes, e.g., Title VII, do not, unless Congress expressly provides, close the door to constitutional claims, provided that the claim is colorable and the plaintiff is seeking only a new hearing or other process rather than a direct award of money by the district courts. *Czerkies v. Department of Labor*, 73 F. 3d 1435, 1440 (7th Cir. 1996)("Each statute must stand on its own two feet, but each is informed by the presumption . . . against slamming the courthouse door in the face of holders of constitutional claims.") *Marozsan v. United States*, 852 F. 2d 1469 (7th Cir. 1988).

In *Keller v. Prince George's County*, 827 F. 2d 952, 957 (4th Cir. 1987), the question was considered "whether Congress intended in adopting § 2 of the Equal Employment Opportunity Act of 1972 to make Title VII the exclusive remedy for public sector employment discrimination in violation of constitutional safeguards." After observing that Title VII was silent on the question and that the legislative history indicated that it was not so intended, the fourth circuit held that Title VII does not preclude a public sector employee from bringing a § 1983 action based on alleged violations of the Equal Protection Clause. Although *Keller* involves the public sector, this Court held in *Bolling* that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws. 347 U.S. 497, 500.

Additionally, other circuits have concluded that unless, and perhaps even if, Congress has acted with particular clarity to shut off review, a cause of action remains available under the Constitution. *Mitchum v. Hurt,* 73 F. 3d 30, 34-35 (3rd Cir. 1996). An important principle to observe is that all government

action based on race . . . should be subjected to a detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed.

In this case, the courts below slammed the courthouse door on petitioner's constitutional claim, nullifying the equal protection mandate of the Fifth Amendment. Therefore this Court's review is warranted to determine whether petitioner has the constitutional right to be protected from the FBI's purposeful unequal treatment. Review is also warranted to determine if the Constitution may require some forum for review of cases involving discrimination, as opposed to a statutory scheme such as Title VII. *Webster* suggests that the Constitution may require an avenue of judicial review for equitable constitutional claims, regardless of any statutory provision to the contrary.

CONCLUSION

For the foregoing reasons, petitioner respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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